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EXAMINER	
COLE, ELIZABETH M	

ART UNIT	PAPER NUMBER
1794	

NOTIFICATION DATE	DELIVERY MODE
10/22/2008	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No.	Applicant(s)	
	10/814,679	HOOD ET AL.	
	Examiner	Art Unit	
	Elizabeth M. Cole	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *08 July 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-5 and 7-47* is/are pending in the application.

4a) Of the above claim(s) *16-33* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-5,7-15,34-47* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action

2. Claims 34-39, 41-44 are rejected under 35 U.S.C. 102(b) as being anticipated by Rochlis, U.S. Patent No. 3,312,583. Rochlis discloses an integral, unitary, molded article formed from a thermoplastic polymer, (col. 1, lines 12-27), such as a vinyl polymer, (col. 12, lines 19-40), which comprises a base structure and a plurality of projecting elements. The projecting elements can be formed so that they have different colors, which meets the limitation of the projecting elements being made from different polymers, or the elements may different in their hardness or other characteristics, (see col. 1, line 65 - col. 2, line 7; col. 0, lines 61 – col. 10, line 24). The base sheet can be solid or porous. See col. 7, lines 45-59. The polymer material comprises pigments to determine the different colors of the projections. The base sheet can be combined with other layers (col.12, lines 41-60), including slip resistant layers, (col. 6, lines 43-46). The finished material can be used in a variety of ways, including as a “zipper” fastener, (i.e., hook and loop type fasteners). See col. 11, lines 43-46. The base sheet can be a different color than the projections. See col. 10, lines 53- 63.

3. Claims 1-5, 7, 9-13, 15, 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rochlis, U.S. Patent No. 3,312,583 in view of Akeno et al, U.S. Patent No. 5,657,517. Rochlis discloses an integral, unitary, molded article formed from a thermoplastic polymer, (col. 1, lines 12-27), such as a vinyl polymer, (col. 12, lines 19-40), which comprises a base structure and a plurality of projecting elements. The projecting elements can be formed so that they have different colors, which meets the

limitation of the projecting elements being made from different polymers, or the elements may different in their hardness or other characteristics, (see col. 1, line 65 - col. 2, line 7; col. 0, lines 61 – col. 10, line 24). The base sheet can be solid or porous. See col. 7, lines 45-59. The polymer material comprises pigments to determine the different colors of the projections. The base sheet can be combined with other layers (col.12, lines 41-60), including slip resistant layers, (col. 6, lines 43-46). The finished material can be used in a variety of ways, including as a "zipper" fastener, (i.e., hook and loop type fasteners). See col. 11, lines 43-46. The base sheet can be a different color than the projections. See col. 10, lines 53- 63. Rochlis differs from the claimed invention because Rochlis does not the claimed structure of the projecting elements, wherein the portion of the projecting elements near the base layer comprise a core and a surface portion and the projecting elements further comprise a terminal portion, wherein the core and the terminal portion are made of one polymer and the surface portion is made of another polymer. Akeno discloses a reinforced molded structure of projecting elements suitable for use in fasteners, comprising a projecting element having a portion near the base layer and a terminal portion and a plurality of reinforcing ribs formed on the surface of the projecting element near the base layer. See figures. The reinforcing elements correspond to the claimed surface portion. The projecting element which extends from the base to the terminal portion corresponds to the claimed core and terminal portions. It would have been obvious to have formed the projecting elements of Rochlis so that they had the structure of the projecting elements of Akeno, in order to form a material wherein the hook fasteners are reinforced. It

further would have been obvious to have employed different polymers, which differed in color, hardness, etc., as taught in Rochlis, in order to form a material which had an improved appearance, strength, etc.

4. Claims 8, 40, 45-46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rochlis in view of Akeno as applied to claims above, and further in view of Clune, U.S. Patent NO. 6,162,040. Rochlis differs from the claimed invention because while Rochlis teaches employing thermoplastic polymers to form the molded article, it does not teach employing polyolefins or polyethylene specifically. Further, Rochlis does not specify the inclusion of metal oxides as a component in the polymer. However, with regard to the metal oxides, since Rochlis does teach including pigments and since titanium dioxide is a conventional and well known white pigment, (Rochlis teaches forming some of the projections so that they are white), it would have been obvious to one of ordinary skill in the art at the time the invention was made to have employed titanium dioxide as a pigment to color some of the projections white in Rochlis, based upon the well known and conventional use of titanium dioxide as a white pigment. With regard to the use of other polymers such as polyethylene to form the projections, Rochlis teaches employing thermoplastic polymers generally, and specifically refers to vinyl polymers. Clune teaches that additional thermoplastic polymers which are suitable for forming molded fastener elements include polyethylene and polypropylene. See col. 5, lines 35-44. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have employed polyethylene and polypropylene as the thermoplastic polymers in Rochlis, in view of the teaching of Clune that such

polymers were recognized in the art as suitable for this purpose. With regard to the particular density of the polyolefins, the person of ordinary skill in the art would have been able to select the polymers which produced projecting elements having the desired properties such as flexibility, hardness, resilience, etc., through the process of routine experimentation, in order to form a material having the optimum and desired properties.

5. Claim1,3,5,7,8,10-12, 34-40, 42-44 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Sallee, U.S. Patent No. 5,976,643. Sallee discloses a base sheet material with a plurality of garnishes projecting therefrom (Figure 1). The base material is constructed of a rigid plastic backing (column 4, lines 1-7) and the garnishes are also formed from plastic material (column 3, lines 58- 67). The garnishes meet the claimed limitations for the projecting element portions because the polymer that forms the terminal part of the garnish is also present in the core of the base section, which is made from a different polymer (see Figures 5-7). The base section meets the limitations of the surface of the lower part of the projecting element. With regard to claims 3 and 11, the base sheet must contain at least one pigment that is different from one of the projecting elements since the base sheet is formed of multiple colors (column 4, line 1). With regard to claim 5, the retaining ring is preferably Derlin (column 6, line 21), which is a thermoplastic acetal. With regard to claim 7, various colors are used to create a camouflaged appearance (column 5, lines 20-21). With regard to claim 8, the garnish is made from polyethylene (column 3, line 60). With regard to claim 10, the base sheet has holes

(Figure 1). With regard to claim 12, the base material is also camouflaged (column 4, line 1). With regard to claim 15, a plurality of projecting elements is present (Figure 1).

6. With regard to claims 34 and 35, the garnishes would comprise at least a first plurality of projecting elements and a second plurality of projecting elements because each set may be colored differently to effect a camouflaged pattern (column 5, lines 11-21). With regard to claims 36, 37, 43, and 44, the base sheet must contain at least one pigment that is different from one of the projecting elements since the base sheet is formed of multiple colors (column 4, line 1). With regard to claims 38 and 40, Sallee discloses the garnishes are made from polyethylene (column 3, line 60).

With regard to the limitation that the planar portion and the projecting portion are integrally molded, Sallee teaches that the attachment of the projecting portion to the base portion may be “permanent”. See col. 5, lines 30-45. A structure which is permanently bonded is an integral structure. With regard to the limitation that the structure is molded, a molded structure is one which is produced by a molding process. Sallee does not teach a molding process but teaches the claimed integral structure. The instant claims are drawn to a product and not to how the product is made. “The patentability of a product does not depend on its method of production. If the product in the product - by - process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe , 227 USPQ 964, 966 (Fed. Cir. 1985).

Once the Examiner provides a rationale tending to show that the claimed product appears to be the same or similar to that of the prior art, although produced by a

different process, the burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product. In re Marosi, 218 USPQ 289, 292 (Fed. Cir. 1983).

The use of 35 USC 102/103 rejections for product by process claim has been approved by the courts. "[T]he lack of physical description in a product - by - process claim makes determination of the patentability of the claim more difficult, since in spite of the fact that the claim may recite only process limitations, it is the patentability of the product claimed and not of the recited process steps which must be established. We are therefore of the opinion that when the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claimed in a product - by - process claim, a rejection based alternatively on either section 102 or section 103 of the statute is eminently fair and acceptable. As a practical matter, the Patent Office is not equipped to manufacture products by the myriad of processes put before it and then obtain prior art products and make physical comparisons therewith." In re Brown , 173 USPQ 685, 688 (CCPA 1972).

Therefore, in the instant case, the burden is on the Applicant to show that the claimed process produces an unobvious difference between the claimed product and the prior art product.

13. Claims 2 and 4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sallee. With regard to claims 2 and 4, Sallee does not disclose what color the retaining collar, which comprises the claimed wall of the projecting element, might be. Sallee does disclose that the material is multi-colored though (column 5, lines 11-21). It would

have been obvious to a person having ordinary skill in the art to use two distinct pigments for the retaining collar and the tufts, since the tufts form a camouflaged pattern and making retaining rings with the exact same color for each tuft would create an unnecessary and great expense because the retaining rings are not disclosed as contributing to the camouflaged pattern.

Sallee does not disclose the use of a slip resistant sheet. Nesbitt teaches that a camouflage material can be backed by a magnetic sheet, which allows the material to be securely fastened to a vehicle without slipping (Abstract). It would have been obvious to a person having ordinary skill in the art at the time of the invention to provide a slip resistant sheet to Sallee in order to allow the camouflage material to be fastened to a vehicle, as taught by Nesbitt.

15. Claims 13 and 45 are rejected under 35 U.S,C. 103(a) as being unpatentable over Sallee in view of Rawlinson (U.S. Patent No. 4,329,196).

Sallee does not disclose what density the polyethylene material should be. Rawlinson teaches that grass-like material made from polyethylene should have a density between 0.90 and 0.93 (column 3, lines 8-10). It would have been obvious to a person having ordinary skill in the art at the time of the invention to use a polyethylene with a density between 0.915 and 0.92 in the garnish of Sallee, since such' range is embraced by the art as being known and it has been held to been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch,* 617 F.2d 272, 205 USPQ 215 (CCPA 1980). t

16. Claims 14 and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sallee in view of Sesselmann (U.S. Patent No. 5,790,987).

Sallee teaches the material may be used on a person (Abstract), but does not disclose the use of filler. Sesselmann teaches that alumina may be added to camouflage material to help reduce odor (column 2, lines 5-27). It would have been obvious to a person having ordinary skill in the art at the time of the invention to include alumina in the material of Sallee in order to reduce odor, as taught by Sesselmann.

Response to Amendment

7. Applicant's deletion of the word "therethrough" from claim 1has overcome the 112 1st paragraph rejection.

8. Applicant's comments regarding the second appeal brief are noted. The deficiencies in the brief are that it contained arguments regarding whether or not the final rejection was premature, which is a petitionable issue rather than an appealable issue. Further, the brief needs to list the grounds of rejection as was done in section 6 of the brief and then provide section headings which correspond to each of these grounds of rejection in the arguments section. The brief sets forth headings but they do not correspond to the grounds of rejection set forth in section 6 of the brief. For example, the brief has headings for arbitrary and capricious, or for claim 1,3,5,7,8,10-12, 34-40, (these are examples only, since the brief contains different headings), but the brief is required to provide arguments under a separate heading for each ground of

rejection, which the 2nd amended brief did not do. The brief provides arguments under headings regarding obviousness, arbitrary and capricious, etc., and then provides arguments under headings which list claims but these headings do not correspond to the grounds of rejection set forth in section 6 of the brief, and therefore the 2nd appeal brief was also non-compliant. So for example, section 6 lists Claims 1,3,5,7,8,10-12, 34-40 and 42-44 as being rejected as anticipated by or obvious over Sallee, US '643. Thus, the arguments need a section heading for this, i.e., Claims 1,3,5,7,8,10-12, 34-40 and 42-44 are rejected under 35 102(e) as anticipated by, or in the alternative under 35 USC 103(c) as obvious over Sallee, U.S. 643. This has to be repeated for each separate grounds of rejection. This information is provided in response to Applicant's comments in the most recent reply dated 7/8/08.

Response to Arguments

9. Applicant's arguments filed 7/8/08 have been fully considered but they are not persuasive.

10. With regard to Rochlis, Applicant argues that it is not clear whether the different components are within a single product or that the differences are product to product but that it appears that they are product to product differences. However, Rochlis teaches at col 1, lines 65 that the projecting elements can form "a" mat or carpet, (singular), wherein the different projecting elements provide different properties to the mat or carpet. Further, at col. 9, line 61-col. 10, line 24 and in the figures discussed in this section, Rochlis teaches a material wherein a single sheet has projecting elements which have different colors or different hardness.

11. Applicant argues that Rochlis does not teach an integral molded structure. However, Rochlis in its title refers to the material as molded as it does through out the disclosure. Further, at col. 9, lines 72-74, Rochlis states that the material is a sheet product having a base from which integrally extend pile formations. Further, Rochlis teaches methods of forming the material by molding the components at col. 10, lines 41-63. Therefore, Rochlis teaches an integral molded material. Further, Rochlis teaches methods to form different colors in the pile at col. 10, lines 1-24, among other places.

12. With regard to the combination of Rochlis and Akeno, Applicant argues that there it is not clear whether Rochlis is being modified by Akeno or Akeno is being modified by Rochlis. This argument is not understood as the rejection clearly sets forth that Rochlis is the primary rejection, identifies where Rochlis differs from the claimed invention, sets forth the teaching of Akeno, and sets forth a reason why the combination would be made.

13. Applicant argues neither Akeno nor Rochlis teach the claimed projecting elements. However, the rejection is a 103 which employs the combination of Rochlis in view of Akeno. The combination of the two references renders the claims obvious as set forth above. Further, it is noted that both Akeno and Rochlis are drawn to "zipper," (hook and loop), fasteners. Akeno discloses a structure which corresponds to the claimed structure for forming reinforced hook and loop fasteners. Therefore, the person of ordinary skill in the art would have been motivated to fabricate the projecting

elements of Rochlis so that they had a structure as taught by Akeno, in order to form a reinforced projecting element which would have greater strength.

14. Applicant requests that the examiner provide an affidavit under 37 C.F.R. 1.104(d)(2) to substantiate the Examiner's personal knowledge because there is no teaching to combine the references. However, KSR forecloses the argument that a specific teaching, suggestion, or motivation is required to support a finding of obviousness. See the recent Board decision Ex parte Smith, --USPQ2d--,slip op. at 20, (Be. Pat. App. & Interf. June 25, 2007) (citing KSR, 82 USPQ2d at 1396) (available at http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071925.pdf). Further, it is noted that the examiner provided a rationale from the references themselves and did not rely on personal knowledge or take official notice of any facts. The rationale for the reference is set forth above. No affidavit is necessary in this circumstance. Further, the product by process limitations of claim 47 are addressed by the Rochlis reference which clearly teaches a molded product. The process steps listed in claim 47 are molding the base and surface portions as an integral structure and molding the cores and respect terminal end portions each as an integral structure that is integral with a respective proximal end portion. Since Rochlis teaches molding the components of the sheet and the projecting elements to form an integral structure as set forth above, Rochlis teaches the process limitations of claim 47.

15. With regard to the rejection over Sallee, Applicant notes that it is assumed that the rejection is actually a 35 USC 102(b) rejection give the date of the reference. However, the instant application claims priority to a provisional application having a

filing date of 9/4/99. Sallee was published on 11/2/99 and therefore does not qualify as prior art under 102(a) or (b) but does qualify as prior art under 102(e). Therefore, the rejection of the claims anticipated using 102(e) is proper.

16. With regard to Sallee, Applicant argues that the Sallee only teaches a mechanical interlock that might be considered permanent. However, Sallee teaches that the attachment of the projecting portion to the base portion may be "permanent". See col. 5, lines 30-45. A structure which is permanently bonded, (or connected, or attached, or combined, etc.), would be an integral structure and there is nothing on the record which would structurally distinguish such a permanently bonded integral structure from a molded integral structure. Applicant argues that claims recite an integrally molded structure and that this is a product limitation not a process limitation, but the way in which Applicant distinguishes the claimed molded article is to say that unlike the prior art is it formed by integrally molding the components. Applicant appears to be arguing that integrally molded is a structural, not a process limitation, but then argues that the prior art products are not made the same way. The claims do not define the structure in any way that distinguishes the claimed structure from the prior art structure. The examiner has taken the position that there is no apparent difference between an integrally molded product and a permanently bonded, connected, attached, joined, etc., product. The claims state that the product is integrally molded and Applicant asserts that this is a structural difference, but Applicant does not state what the difference is. Applicant states at page 15 of the response that molded "generally" means that the parts a continuum of the material making up the product without

interfaces, glue joints or the like in the molded structure. However, none of these limitations regarding a lack of interface, glue joints,etc, appear in the claims. Further, molding processes such as injection molding processes produce a clear interface, even though the product is formed by molding and is integral. Applicant has not provided arguments establishing what the product difference is between an integrally molded product or a product wherein components are permanently attached, joined, bonded, etc.

17. Applicant states that the examiner concedes the point that the instant claims are drawn to a product and not to how the product is made. The examiner has consistently maintained this position throughout prosecution. The issue is that the prior art product appears to be the same as the claimed product, even though it is not made the same way. Therefore, the burden is on Applicant to show that the differences in how the product is made results in an unobvious difference between the claimed invention and the prior art product. Applicant states that the term molded imparts structure but does not state what the structure imparted by virtue of being integrally molded is, and the claims do not recite structure which distinguishes the claimed structure from a structure such as is set forth in Sallee which is not formed by integrally molding, but which is formed so that the components are permanently combined.

18. Applicant argues that permanently bonded is different than permanently attached and that both are different than integrally molded, because in integrally molded there is no interface between the various portions that are joined together providing a continuum of material. However, this definition of integrally molded is not found in the claims.

Further, as noted above, in injection molding, an integral molded article is formed where there is an interface between various portions. The limitations that Applicant is arguing regarding integrally molded are not found in the instant claims.

19. Applicant states that Sallee is teaching that the parts can be both permanent and removable. However, the examiner does not interpret the teaching of Sallee as being that the parts should be both permanently attached and removable, but rather that the parts can either be permanently attached or removable. Therefore, the rejection is maintained.

20. Applicant notes that the pertinence of other patents allowed by this examiner is that they show that the examiner's actions are arbitrary and capricious and violate the Due Process Clause of the Constitution and the Administrative Procedures Act and that the examiner might want to consult with the solicitor's office on this point. However, as noted in the previous action at paragraph 12, each case is considered on its own facts. Further, in this case, the examiner has pointed to Rochlis which actually uses the terms integral and molded and has clearly set forth that while Sallee does not make the product by molding, it appears that the final product is the same. Therefore, the record is clear regarding the basis for the rejections which are set forth in this case.

21. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth M. Cole whose telephone number is (571) 272-1475. The examiner may be reached between 6:30 AM and 6:00 PM Monday through Wednesday, and 6:30 AM and 2 PM on Thursday.

The examiner's supervisor Rena Dye may be reached at (571) 272-3186.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

The fax number for all official faxes is (571) 273-8300.

/Elizabeth M. Cole/
Primary Examiner, Art Unit 1794

e.m.c